LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 425

BIRMINGHAM ICE AND COLD STORAGE COMPANY
and SHAW WAREHOUSE COMPANY,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY et al.,
Appellees.

APPELLANTS' JURISDICTIONAL STATEMENT.

DAVID J. VANN,
2100 Comer Building,
Birmingham 3, Alabama,
A. ALVIS LAYNE,
Pennsylvania Building,
Washington 4, D. C.,
Counsel for Appellants.

Of Counsel:
WHITE, BRADLEY, ARANT, ALL & ROSE,
LAYNE, BRIDGEMAN and GOTTESMAN.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Nature of the proceedings below and Statutes pursuant to which brought	2
Judgments and decrees sought to be reviewed	3
Notices of appeal	4
Statutes conferring jurisdiction	4
Cases sustaining jurisdiction	6
Questions presented	6
Circumstances of the case	6
The questions	7
Statement of the case	8
Why the questions are substantial	11
Conclusion	12
Appendix A—Order dismissing Complaint in intervention	13
Appendix B—Order denying discovery with respect to Chattanooga Warehouse and Cold Storage Company	15
Appendix C—Memorandum Opinion and Decree	17
Appendix D—Order of July 31, 1962	33
Appendix E—Amendment to Memorandum Opinion	34
Appendix F—Statutes relied on	35

Cases Cited.

Alexander Spurnt & Son v. United States, 281 U. S. 249 6

Boston Tow Boat Co. v. United States, 321 U. S. 632 6

Shaw Warehouse Company v. Southern Railway Company, 288 F. 2d 759, rehearing denied, Brown, J., dissenting 294 F. 2d 850 (5th Cir., 1961) 9

Shaw Warehouse Company v. Southern Railway Co., 308 I. C. C. 609 (1959) 2, 8

Southern Railway Company v. United States, 186 F. Supp. 29 ..... 2, 8

Statutes Cited.

Elkins Act, Sections 1, 2 and 3 (49 U. S. C., §§ 41, 42 and 43) 2

Interstate Commerce Act, Sections 2, 3, 6 (7) and 20 (9) (49 U. S. C., §§ 2, 3, 6 (7) and 20 (9)) 2

28 U. S. C., § 2101 4

28 U. S. C., § 2323 5

49 U. S. C., § 45 4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

BIRMINGHAM ICE AND COLD STORAGE COMPANY
and SHAW WAREHOUSE COMPANY,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY et al.,
Appellees.

APPELLANTS' JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

This is an appeal by intervening plaintiffs from three orders of the District Court for the Northern District of Alabama, Southern Division, two rendered on October 19,

1961, and one on June 8, 1962. The orders of October 19, 1961 are not reported. The opinion of June 8 is reported at 205 F. Supp. 640.

The three orders are reproduced in the Appendix to this statement as Appendices A, B and C.

JURISDICTION.

Nature of the Proceeding Below and Statutes Pursuant to Which Brought.

The proceeding below was instituted by the United States of America at the request of the Interstate Commerce Commission. The Government's Complaint was filed under Sections 1, 2 and 3 of the Elkins Act, as amended [49 U. S. C., §§ 41, 42 and 43] and Sections 2, 3, 6 (7) and 20 (9) of the Interstate Commerce Act, as amended [49 U. S. C., §§ 2, 3, 6 (7) and 20 (9)]. (See Appendix D.) The Complaint sought to enjoin the defendants from engaging in practices under which the railroad defendants furnished facilities to shippers at rents which were below prevailing market rents for such facilities, extended credit on such rents, and contracted to permit the shippers to purchase the facilities with funds to be secured by a pledge of the railroad's credit. Except for subsequent variations of these concession practices, the practices were declared unlawful in *Shaw Warehouse Company v. Southern Railway Co.*, 308 I. C. C. 609 (1959), and *Southern Railway Company v. United States*, 186 F. Supp 29 (Three Judge Court, N. D., Ala. 1960).

Appellants intervened in support of the Government's Complaint, as amended, asked additional relief, and added additional parties defendant.

The Court dismissed the complaint below with respect to the one defendant added by the Complaint in Intervention. On final hearing it found that the violations charged were established, but it refused to give full relief as prayed by the Government, and by the Intervener-Appellants.

Judgments and Decrees Sought to Be Reviewed.

This is an appeal from three orders of the District Court for the Northern District of Alabama, Southern Division (per Lynne, D. J.):

1. Order of October 19, 1961, by which Appellants' Complaint in Intervention was dismissed against the Defendant Chattanooga Warehouse and Cold Storage Company without any motion to dismiss having been filed by this party (See Appendix A).

2. Order of October 19, 1961, insofar as said order denies discovery with respect to Chattanooga Warehouse and Cold Storage Company and its facilities at Chattanooga, Tennessee (See Appendix B).

3. Memorandum Opinion and Decree of June 8, 1962 (205 F. Supp. 649), insofar as the decree refers to Jefferson Warehouse & Cold Storage Company, a corporation, and W. C. Hudlow, Jr. and the facilities occupied by them at the Birmingham Food Terminal, and insofar as the decree fails to grant relief with respect to Thomas N. Nelson, Birmingham Terminal Cold Storage Company and Chattanooga Warehouse and Cold Storage Company (See Appendix C).

Notices of Appeal.

Appellant-Intervenors originally filed their Notice of Appeal on June 20, 1962. An order was entered by the District Court on July 30, 1962, extending the time for docketing this appeal until Sept. 10, 1962.

Subsequently, on July 31, 1962 the Court entered an order and an amendment to the memorandum opinion and decree. This order and amendment to the decree were entered pursuant to motions filed on behalf of Jefferson Warehouse & Cold Storage Company, W. C. Hudlow, Jr., Southern Railway Company, and Georgia Industrial Realty Company, to alter and amend such memorandum opinion and decree (See Appendices D and E).

Thereupon, Appellants refiled their appeal on August 8, 1962.

Statutes Conferring Jurisdiction.

Jurisdiction of this Appeal is believed to be conferred by the following statutes:

1. 49 U. S. C., § 45:

> In every civil action brought in any district court of the United States under any of said Acts ["An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, "An Act to regulate commerce," approved February 4, 1887, or any other Acts having a like purpose that hereinafter may be enacted], wherein the United States is complainant, an appeal from the final judgment of the district court will lie to the Supreme Court.

2. 28 U. S. C., § 2101:

* * * * * * *

> (b) Any other direct appeal [other than appeals under 28 U. S. C., §§ 1252, 1253, and 2282] to the

Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

3. 28 U. S. C., § 2323:

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23 and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

Cases Sustaining Jurisdiction.

The Intervenors seek by this appeal to protect independent rights which have been violated in that they continue to be subjected to the results discrimination by reason of competition financed by funds owed the railroad. *Boston Tow Boat Co. v. United States*, 321 U. S. 632; *Alexander Sprunt & Son v. United States*, 281 U. S. 249.

QUESTIONS PRESENTED.

Circumstances of the Case.

Intervenors Birmingham Ice & Cold Storage Company and Shaw Warehouse Company operate public warehouses in Birmingham, Alabama. The former operates a cold storage warehouse; the latter a dry storage warehouse. Both compete with the warehouses of a corporation owned by W. C. Hudlow, Jr., Jefferson Warehouse & Cold Storage Company, successor to former Birmingham competitors of Appellants, Thomas N. Nelson & Company and Birmingham Terminal Cold Storage Company. Both the present Hudlow company and its predecessors have been sustained in a multi-million dollar business with an investment of only $1,000 solely by rental concessions granted by the railroad.

Another Hudlow corporation, Chattanooga Warehouse and Cold Storage Company, has enjoyed similar rental concessions from Southern in Chattanooga, Tennessee. The operations of Hudlow's Birmingham corporation were maintained, at least in part, by the transfer of the benefits of the Chattanooga concessions to the Birmingham operation.

The practices, both in Chattanooga and Birmingham, all involved three types of rental practices:

(1) Failure to charge rents which included recovery of construction costs as represented by depreciation.

(2) Failure to charge rents for facilities leased and available for use.

(3) A continuing pattern of extending credit on rents due resulting in the use of rent monies due the railroad as working capital to sustain the business.

The Questions.

1. Where rents which have been charged a shipper are insufficient to include the recovery of construction costs, in the form of depreciation, as required by prevailing market practices, should continued occupancy by the shipper be permitted without either (a) requiring payment of all back-rents due at rentals found to be required by law by the Interstate Commerce Commission, or (b) requiring the shipper to forfeit to the United States a sum equal to three times the value of the concession enjoyed as prayed in a complaint in intervention?

2. Where a shipper is found to be a successor to corporations owing large sums of back-rent to a railroad, should continued occupancy by that shipper be permitted without either (a) requiring payment of the back-rents owed by the predecessor, or (b) requiring a forfeiture of a sum equal to three times the sums owed by such predecessors as prayed in a complaint in intervention?

3. Where a railroad lessor has full control of the assets of a shipper-tenant which owes it large sums of back-rent, and where it permits all of those assets to be taken

over by a successor tenant, together with $15,700 in cash deposited by the railroad to the predecessor's account, should such successor tenant be permitted to continue occupancy of railroad owned premises without either (a) repaying the value of such assets and cash received from the railroad, or (b) forfeiting to the United States a sum equal to three times the value of such assets and cash as prayed in a complaint in intervention?

4. Where an individual owns two corporations which are operated jointly to the extent of transferring equipment and personnel between the two, and of borrowing funds on the credit of individual owner to augment working capital, should the court in considering the practices of the individual and one corporation dismiss case as to the related corporation and refuse all discovery with reference to the operations and practices of the related corporation?

STATEMENT OF THE CASE.

The practices of Southern considered below have been the subject of a proceeding in Interstate Commerce Commission. The Commission found them to be unlawful in that the rents charged (a) failed to take full costs into account, and (b) failed to include the recovery of construction costs, in the form of depreciation, as required by prevailing market practices, (c) were not collected for long periods of time. *Shaw Warehouse Company v. Southern Railway Company*, 308 I. C. C. 609 (1959).

This result was affirmed in *Southern Railway Company v. United States*, 186 F. Supp. 29 (Three-Judge Court, N. D., Ala. 1960), where, to dispose of arguments raised by the railroad, it was further held that it was unlawful for a railroad to extend credit by second mortgages, and

by the guarantee of first mortgage loans, so as to enable shippers, through the use of the railroad's credit, to buy facilities owned by the railroad. This would result, it was held, in the railroads furnishing working capital to the shipper-tenants.

In damage suits filed by Appellants and others the District Court charged the jury that such rents did not have to include recovery of construction costs in the form of depreciation, and that such second mortgages and mortgage guarantees did not violate the Commerce Act. The Court of Appeals affirmed in *Shaw Warehouse Company v. Southern Railway Company*, 288 F. 2d 759, rehearing denied, Brown J., dissenting 294 F. 2d 850 (5th Cir., 1961). There the court disregarded the decisions of the Three-Judge Court and of the Interstate Commerce Commission. This Court denied certiorari in April 16, 1962, with Justices White and Frankfurter not participating (October Term, 1961, No. 747). A Petition for Rehearing From Denial of Certiorari is now pending before the Court.

The same Court has now followed the Three-Judge Court and disregarded the Court of Appeals to give partial relief in the suit below under the Elkins Act and the Commerce Act. But it has refused to give full relief with respect to concessions granted in so far as they discriminate against and injure the businesses of the Appellants.

The Court found that:

(1) Defendant Hudlow was the alter ego of Jefferson Warehouse & Cold Storage Company;

(2) Jefferson Warehouse & Cold Storage Company succeeded to the business of two former tenants owing Southern over $230,000 in back-rents;

(3) All of the assets of the former tenants, together with an additional $15,700 cash supplied by Southern, were used, not toward the discharge of the back-rent obligations, but to finance the business of the new corporation; and,

(4) At no time from July 1958 to June 1962 did Jefferson Warehouse & Cold Storage Company pay the full rents required by prevailing market practices as established under the Commission order.

Although the case below was filed in July 1958, and the defendants had knowledge of it at that time, the Court's order does not require the payment of any back-rent by Hudlow or his Birmingham corporation except the nominal sum of $29,758.41 due since the effective date of the Commission order, September 1, 1960. This sum is not even equal to the direct rebates paid in the form of the assets of the former tenants and of cash paid directly by Southern.

While to require the payments of back-rents to Southern which it has studiously endeavored to avoid collecting would appear to result in a type of undeserved windfall, foregiveness of such rents has enabled Appellants' competitor to operate entirely on capital indirectly furnished by the railroad. And the alternative prayer for an Elkins Act forfeiture would avoid this windfall in any event.

Furthermore, the evidence shows large rental concessions, exceeding $50,000, were made by Southern to another wholly owned Hudlow corporation, Chattanooga Warehouse and Cold Storage Company. It also shows that equipment valued at more than $9,000 was transferred from this company to the new Birmingham company when the Birmingham Company had assets of only $1,000. Although the merit of charges made in Appellants' Com-

plaint in Intervention is clear, Appellants by the orders of October 19, 1961, have been denied an opportunity for relief to plug this indirect flow of the benefit of concessions, or even to have discovery to fully develop the scope of the concessions, or of the extent of the transfer of concessions to their direct competitor. Without such relief, it is clear that only one hole in a very leaky bucket has been patched.

Why the Questions Are Substantial.

The case below, together with its companion case on rehearing (O. T. 1961 No. 747, *Shaw Warehouse Company v. Southern Railway Company*) present a definitive example of efforts to enforce those provisions of the Commerce and Elkins Acts which are designed to protect the ultimate integrity of the railroad rate regulation structure.

The failure of enforcement represented by these cases, unless reviewed by this Court, stand today as an invitation to railroads to disregard these important protections for the millions of small shippers whose business success or failure so often depends on rail service.

Cases such as these will rarely arise where the stakes of those who suffer are sufficiently large to warrant a full contest of such railroad practices. Failure to give a full hearing to the relatively substantial small independent businessmen represented by these Appellants, will make similar practices common place as to those smaller and weaker in every city and town in America. This general importance of the issues presented clearly justify full plenary consideration by this Court of the questions here presented.

CONCLUSION.

Appellants respectfully submit that probable jurisdiction should be noted and the case advanced to the argument calendar for full consideration.

DAVID J. VANN,
2100 Comer Building,
Birmingham 3, Alabama,

A. ALVIS LAYNE,
Pennsylvania Building,
Washington 4, D. C.,
Counsel for Appellants.

Of Counsel:
WHITE, BRADLEY, ARANT, ALL & ROSE,
LAYNE, BRIDGEMAN and GOTTESMAN.

APPENDIX A.

In the United States District Court for the
Northern District of Alabama,
Southern Division.

United States of America, Plaintiff, vs. Southern Railway Company, a Corporation, et al., Defendants.	Civil Action No. 9155.

This cause, coming on to be heard, was submitted upon the respective motions filed in behalf of defendant Jefferson Warehouse & Cold Storage Company, of defendant Southern Railway Company, of defendant Georgia Industrial Realty Company, and of all other defendants remaining as parties hereto, to dismiss the complaint in intervention filed by Birmingham Ice & Cold Storage Company and Shaw Warehouse Company. After consideration of the oral arguments and written briefs of counsel, the court is of the opinion that such complaint is to be dismissed only as it relates to defendant, Chattanooga Warehouse and Cold Storage Company. The disposition which the court is about to make of such motions is not to be construed as an indication that an opinion is presently entertained that the intervening plaintiffs may be entitled to any relief which is not included in or ancillary to the prayers for relief in the original complaint as amended.

It is accordingly Ordered, Adjudged and Decreed by the court that the complaint in intervention is dismissed only as it relates to defendant Chattanooga Warehouse and Cold Storage Company.

It is further Ordered, Adjudged and Decreed by the court that each of such motions in all other respects is overruled.

Done, this the 19th day of October, 1961.

Seybourn H. Lynne,
Judge.

APPENDIX B.

In the United States District Court for the Northern District of Alabama, Southern Division.

United States of America, Plaintiff, vs. Southern Railway Company, a Corporation, et al., Defendants.	Civil Action No. 9155.

This cause, coming on to be heard, was submitted upon the respective objections filed in behalf of defendants Southern Railway Company, Georgia Industrial Realty Company, Birmingham Food Terminal, Jefferson Warehouse & Cold Storage Company, and W. C. Hudlow, Jr., to the interrogatories propounded by intervening plaintiffs, Birmingham Ice & Cold Storage Company and Shaw Warehouse Company. (The complaint having been dismissed against defendant Chattanooga Warehouse and Cold Storage Company, its objections to such interrogatories have been rendered moot.)

After consideration of the oral arguments and written briefs of counsel,

It is Ordered, Adjudged and Decreed by the court that each of such objections is sustained to the following numbered interrogatories: 1 (d), (e), (f), (g), (h), (i); 3 and each of its subparts; 7 and each of its subparts; 9 and each of its subparts; 10 and each of its subparts, and 11 and each of its subparts.

It is further Ordered, Adjudged and Decreed by the court that each of such objections to all other interrogatories be and the same is hereby overruled.

Done, this the 19th day of October, 1961.

Seybourn H. Lynne,
Judge.

APPENDIX C.

In the
United States District Court for the Northern
District of Alabama, Southern Division.

Birmingham Food Terminal, Inc., a Corporation, et al., Plaintiffs. v. Southern Railway Company, a Corporation; et al., Defendants.	}	Civil Action No. 9080.
United States of America, Plaintiff, v. Southern Railway Company, a Corporation, et al., Defendants.	}	Civil Action No. 9155.
Southern Railway Company, et al., Plaintiffs, v. A K Investment Corporation, et al., Defendants.	}	Civil Action No. 9815.

MEMORANDUM OPINION AND DECREE.

These actions, having been consolidated by order on pretrial hearing entered January 15, 1962, were tried to the court, without the intervention of a jury, from April 23, 1962, through May 2, 1962, on a mass of documentary evidence and oral testimony.

The common threads which run through these cases are the paramount questions of what rentals must be charged and collected by Southern from tenants at the Birmingham Food Terminal and what is the minimum price for which any of such premises may be sold.

Since the facts disclosing unlawful rebates, favoritism and unjust discriminations allowed and practiced by Southern at the Birmingham Food Terminal in favor of tenants who have been shippers or consignees of freight or who have been otherwise interested in or affected by rates on shipments moving into or out of such terminal were explicated in the report and order of the Interstate Commerce Commission, dated October 6, 1959, in *Shaw Warehouse Company v. Southern Railway Company et al.*, 308 I. C. C. 609 (Docket No. 32241), were discussed at length in *Southern Railway Company v. United States*, 186 F. Supp. 29 (N. D. Ala. 1960), and were adverted to in *Shaw Warehouse Company v. Southern Railway Co.*, 288 F. 2d 759 (C. A. 5, 1961), *rehearing denied*, 294 F. 2d 850 (C. A. 5, 1961), the court is content to adopt such findings of fact as supported by the evidence adduced upon the trial of these cases.

In an effort to bring the issues into proper perspective and to compress into ultimate findings the multitudinous facts in a complicated record, the court has focused its attention upon the situation as it existed on September 1, 1960, the effective date of the I. C. C. order referred to hereinabove and has determined not to apply such order retrospectively.

The chronology of these cases, the parties thereto and the issues tendered therein have influenced the court in molding a decree which will accomplish equal justice between all affected parties.

Civil Action No. 9080.

The complaint was filed on May 15, 1958. Plaintiffs may be generically described as parties who were then tenants at the Birmingham Food Terminal. Either they or their predecessors had entered into the "Round Robin Agree-

ment," dated October 18, 1955, which related generally to the eventual sales price of each building at the Terminal and the intermediate rental to be paid pending consummation of the sale. Defendants were Southern Railway Company, a corporation (hereafter Southern), and its wholly owned subsidiary, Georgia Industrial Realty Company, a corporation (hereafter for obvious reasons omitted or ignored except in the court's order).

Plaintiffs allege a dispute as to the amount of construction costs which should enter into the agreed basis for computing both rentals and sales prices and prayed for a declaratory judgment establishing rentals and sales prices to be paid by them to defendants.

Civil Action No. 9155.

The complaint was filed July 18, 1958. The plaintiff was the United States of America. Defendants were Southern and tenants who had signed the "Round Robin Agreement," and realty holding companies subleasing to the tenants at the Food Terminal, allegedly shippers or receivers of freight. Contending that the course of transactions between Southern and the tenants constituted a conspiracy by all to violate the provisions of the Elkins Act against offering, granting, giving and soliciting, accepting and receiving rebates, concessions, advantages, and discriminations, plaintiff prayed for an injunction against the sale of any premises at the Food Terminal at less than full cost or fair market value and the renting of such premises at rentals less than the fair market rental or rentals computed upon the full cost of such premises.

There was a prayer for a temporary restraining order which was set down for hearing on July 21, 1958. On the appointed date the court was advised that extensive hearings relating to the Birmingham Food Terminal proj

ect had been held before an examiner of the Interstate Commerce Commission, which in due time would issue a report and order, and that private suits for damages instituted by Shaw Warehouse Company, Birmingham Ice and Cold Storage Company, and Boggs Cold Storage Company against Southern were then pending on the docket of this court. Counsel representing the interests of the United States, the Interstate Commerce Commission, the tenants and the private litigants entered into a full discussion with the court as to what procedures should be followed in order to avoid unseemly conflict between Commission order and court decree. It was recognized that the result of the private litigation might be inconsistent with Commission action. Counsel for plaintiffs in Civil Action No. 9080, above, vigorously insisted that their case, first filed, should be first tried.

The court expressed an opinion that good judicial administration suggested that the private cases should be tried at the earliest practicable date, whether or not the Commission had theretofore entered its report and order; that the status quo should be preserved in this case, and that the trial of number 9080 should be held contemporaneously with or after the final disposition of this action. Counsel for all interested parties except the attorneys for the defendant tenants, as appears above, agreed to this procedure.

On July 30, 1958, Southern and the United States having entered into a stipulation that Southern would not execute and deliver a conveyance of title to any of the properties included in the Birmingham Food Terminal without first having given a thirty-day notice to the Interstate Commerce Commission of intention to convey, the court entered an order continuing the prayer for a temporary restraining order to be reset only upon motion of plaintiff. No motion for resetting was ever filed.

Civil Action No. 9815.

The complaint was filed November 18, 1960. Plaintiff was Southern. Defendants were then tenants at the Food Terminal and had signed or were successors in interest to those who did sign the "Round Robin Agreement." The complaint adverted to the order of the Interstate Commerce Commission, effective September 1, 1960, and contained prayers that the rent levels established by the "Round Robin Agreement" be declared illegal (by subsequent amendment Southern made it plain that it did not concede the invalidity of the "Round Robin Agreement," but recognized that it was bound by the Commission order); that judgment be entered in favor of plaintiff and against each defendant for the difference between the rent actually paid by each defendant from and after September 1, 1960, and the rents established by the I. C. C. order and that each defendant be permanently enjoined from continuing to occupy his respective premises at the Birmingham Food Terminal without paying rent at the level required by the I. C. C. order.

Neither Jefferson Warehouse and Cold Storage Company (hereafter Jefferson Company) nor W. C. Hudlow, Jr. (hereafter Hudlow), was a party to any one of these three cases until added as defendants to the complaint in intervention filed in behalf of Birmingham Ice and Cold Storage Company and Shaw Warehouse Company on May 5, 1961, allowed June 2, 1961. On September 1, 1961, the United States filed an amended complaint adding Jefferson Company and Hudlow, together with Southern Bonded Warehouse Company as parties defendant, which amendment was allowed October 12, 1961.

It was conceded that neither the pertinent provisions of the Elkins Act, 49 U. S. C. A., §§ 42 and 43, nor of the Interstate Commerce Act, 49 U. S. C. A., §§ 2, 3 and 6 (7), nor the order of the Interstate Commerce Commission,

supra, apply to tenants not shown to have been shippers or receivers of freight or interested in or affected by rates on shipments moving in or out of the Food Terminal. A heated contest developed upon the fact issue thus raised. Without discussing the welter of evidentiary details, the court, declining to apply the doctrine of "de minimis," finds that the tenants and realty holding companies whose names appear hereinbelow on the schedule of rents to be charged and collected by Southern, are shippers or receivers of freight.

Defendant, George Espy Produce Company, has never been a shipper or receiver of freight. Neither W. L. Smith Poultry Company, Inc., nor its successor, Smith's Pride, Inc., occupied premises at the Food Terminal on or after September 1, 1960.

Southern Bonded Warehouse Company, a corporation, was a shipper or receiver of freight on and after September 1, 1960. However, it paid in full all rentals computed according to the I. C. C. order and has since removed from the Terminal. Accordingly appropriate orders of dismissals are due to be entered as to each of these above-named defendants.

Following is a schedule of the numbered buildings at the Birmingham Food Terminal, the tenant of each occupied building as of September 1, 1960, together with the minimum price at which each building may be sold and the minimum monthly rental at which each building may be rented in compliance with the order of the Interstate Commerce Commission, *supra*.

At the conclusion of oral arguments on May 2, 1962, all tenants in buildings for which minimum monthly rentals are fixed in the schedule below were advised that such rentals were due and payable by them for the month of May, 1962, and for each month thereafter, except the

tenant George Espy, who is neither a shipper nor a receiver of freight.

Building No.	Tenant	Minimum Sales Price	Minimum Monthly Rental
1	Doc's Transfer & Whse. Co. Piggly-Wiggly (sub-tenant)	$150,153.56	$1,239.32
2	Dealt with separately		
3	Alabama Potato Service	68,200.13	564.29
4	Vacant	92,211.33	760.64
5	Vacant	333,536.62	2,771.36
6	S. T. Jerrell Company	107,636.18	890.45
7	Alabama Paper	161,549.81	1,335.01
8	Dealt with separately		
9	Birmingham Frozen Foods	149,276.30	1,239.40
10	Vacant	60,887.50	502.51
11	Bruno's Food Stores	97,992.70	808.50
12	Bryan Bros. Packing Co.	439,065.15	3,650.57
13	Early American Foods, Inc.	45,621.18	376.87
14	Home Provision Company	79,550.15	660.14
15	Associated Grocers of Ala.	697,946.98	5,778.88
16	Simonetti, Inc. and Simonetti Realty Co., Inc.	181,448.04	1,497.40
17	Flint Refrigeration Co. and A. & L. Realty Co., Inc.	128,927.84	1,066.17
18	Eidson Produce Co. and Eidson Realty Co., Inc.	193,347.35	1,599.18
19	Alex Kontos Fruit Co. & A—K. Investment Co.	59,647.66	494.17
20-A	Magic City Produce Co.	195,019.12	1,612.23
20-B	George Espy*	154,043.30	1,274.38

* Not shipper or receiver of freight. Minimum sales price and monthly rental applicable only in the event this building is sold or rented to shipper or receiver of freight.

Careful consideration has been accorded to the contentions of Southern and the United States that each of such tenants should be required to pay in fair and equitable installments the difference between the rent actually paid by such tenant and the rent which the court finds that Southern is compelled to charge and collect under the order of the Interstate Commerce Commission, at least from and after September 1, 1960. Perforce, the court recognizes the merit of this position. In the exercise of its discretion, the court is influenced to require payments in

such tenants and collection by Southern of the new rents only from and after May 1, 1962.

Number 9080 was a true adversary proceeding. Therein these tenants and their predecessors in interest were bitterly complaining of the allocation by Southern of construction costs to the base upon which the sales price and the rental of each building was to be computed according to the outstanding agreement. It is true that their complaints were swept aside by the order of the Interstate Commerce Commission of which they are conclusively presumed to have had notice and by which they are legally bound. But it is worthy of note that the Commission was not unanimous in concluding that the agreed rentals and sales prices were less than fair market value or less than compensatory and that a jury in the private litigation, *Shaw Warehouse Company v. Southern Railway Co.*, 288 F. 2d 759 (C. A. 5, 1961), after considering most of the evidence before the Commission and much that was not, found that such agreed rentals and sales prices were not violative of the Interstate Commerce Act. Moreover, in Civil Action number 9155 each tenant has continued stoutly to maintain that its connection with the shipment or receipt of freight moving into or out of the Food Terminal has not been and is not now such as to bring it within the coverage of the Elkins Act or the Interstate Commerce Act. Each has invoked the doctrine of "de minimis" to sustain it. While the court has concluded otherwise, it required a full dress trial to reach this result.

As to the Jefferson Company and Hudlow, tenants of buildings numbered 2 and 8, matters stand differently. Civil Action number 9155 was not brought under Section 16 (12) of the Interstate Commerce Act (49 U. S. C. A., § 16 (12)). It is a proceeding under Section 3 of the Elkins Act (49 U. S. C. A., § 43) and Section 20 (9) of the,

Interstate Commerce Act (49 U. S. C. A., § 20 (9)) to enforce such Acts. The court and the parties are bound by the report and order in *Shaw Warehouse Company v. Southern Railway Company, supra*.

On and prior to July 1, 1958, Thomas N. Nelson and Company (hereafter Nelson Company) occupied building number 2 and Birmingham Terminal Cold Storage (hereafter Terminal Cold Storage) occupied building number 8 at the Food Terminal and each of them conducted therein a public cold storage warehouse business in direct competition with the intervenor, Birmingham Ice and Cold Storage Company. Each was a shipper or receiver of freight. As of July 1, 1958, Nelson Company owed back rents, later found inadequate by the Commission, in the amount of $176,410.04 and Terminal Cold Storage owed $61,239.88. Neither was able to pay its arrearage and neither was able to continue its operation.

Into this atmosphere entered Hudlow, who for some time theretofore had been operating his wholly owned Chattanooga Warehouse and Cold Storage Company (hereafter Chattanooga) at Southern's Chattanooga Food Terminal. He knew that the rental practices at the Birmingham Food Terminal were under investigation by the Commission and that Civil Action number 9155 had been filed in this court.

In July, 1958, Hudlow entered into an agreement with Southern to take over and operate these warehouse facilities at a basic rental rate below that later prescribed by the Commission, to be charged solely on the basis of space actually utilized, thus insuring himself against the normal business risks inherent in a contracting and expanding market. He was assured of Southern's cooperation in preserving the continuity of operations *vis-a-vis* customers of Nelson Company and Terminal Cold Storage who held

outstanding warehouse receipts and in protecting the good will of these companies.

Jefferson Warehouse was organized in July, 1958; its paid-in capital was $1,000 and all of its stock was owned by Hudlow. It formally became a tenant of buildings numbers 2 and 8 on August 1, 1958, on the above-mentioned rental basis. During July and August, 1958, with Southern's approval, Hudlow purchased all of the stock of Nelson Company in consideration of one dollar and an agreement to employ its president for five years at an annual salary of $7,200. He purchased all of the stock of Terminal Cold Storage in consideration of one dollar and an agreement that he would repay the principal of an outstanding bank loan, personally endorsed by the owners, in the amount of $20,500 out of the profits of the cold storage warehouse business then being operated in building number 8.

Thereafter the stock thus acquired was endorsed in blank and delivered to Southern. But the assets of each company were placed in the hands of a vice-president of Jefferson Company for liquidation. None of such assets were applied to unpaid rents. On the contrary, they were used to protect the good will of the going businesses to which Jefferson Warehouse succeeded. Along with a major portion of the sum of $15,700 deposited by Southern to the account of Nelson Company they were expended for the payment of trade accounts, for furnishing warehouse equipment to the use of Jefferson Company by making lease or note payments to prevent repossession of such equipment, and for transferring precollected warehouse charges to furnish working capital to Jefferson Company.

Hudlow insists that the record of this trial is barren of evidence connecting him individually with the shipment or receipt of freight. But the finding that the foregoing

concessions granted by Southern to Jefferson Company were solicited by Hudlow personally and were availed of by his wholly owned corporation, created as a part of the concession device, requires nonrecognition of the legal fiction of a separate corporate entity. This principle is too well established to require extensive citation of authorities. See *e. g., United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (E. D. Wisc. 1905). From and after September 1, 1960, Jefferson Company has paid rent on buildings numbers 2 and 8, computed by Southern in compliance with the Commission order, on the basis of the space actually utilized by it in each of such buildings. Since the court finds that at all times each entire building, including office space but excluding each future expansion area, has been made available by Southern for use by Jefferson Company, the court concludes that from and after September 1, 1960, the rent for each building should have been charged and collected on the basis of entire as opposed to partial occupancy.

Insisting that it derived no conceivable benefit therefrom, Jefferson contends that there should be excluded from the rent base the early completion cost in the amount of $26,500 and the cost incurred to correct defectively installed refrigeration equipment in the amount of $18,229.67, as to building number 2, and the early completion cost of $40,000 and the latent defect cost of $15,010.12, as to building number 8.

In view of the circumstances, adverted to above, surrounding the transition of the going businesses of previous tenants to Jefferson, the court holds that such cost items are necessarily includable in the rent base.

Finding that the expansion area provided for building number 2 was occupied by Jefferson Company only for the period from September 1, 1960, through January, 1961, and that the expansion area provided for building num-

ber 8 was at no time occupied by or available to Jefferson Company in calculating the back rent due Southern by Jefferson Company and Hudlow the court has taken into consideration only rent due for the expansion area of building number 2 for the period of actual occupancy.

The court finds that to have avoided unjust discrimination, favoritism, and invidious rebates, Southern should have charged and collected and Jefferson Company and Hudlow should have paid from September 1, 1960 through April 30, 1962, including the five months occupancy of the expansion area of building number 2, rents aggregating $431,251.57, whereas Southern charged and collected and Jefferson Company and Hudlow paid as rentals the sum of $401,493.56. Thus, judgment is due to be entered in favor of Southern and against Jefferson Company and Hudlow in the amount of $29,758.41 with appropriate decretal provisions for its expeditious collection and payment without the aid of Southern's credit.

Following is a schedule of the minimum sales price and the minimum monthly rental for buildings numbers 2 and 8, together with the expansion area of each building, established by this judgment:

Building No	Tenant	Minimum Sales Price	Minimum Monthly Rental
2	Jefferson Warehouse No 1	$1,581,858.46	$12,458.88
Expansion Area of Building No 2	Vacant		648.18
8	Jefferson Warehouse No 2	1,153,767.81	8,941.67
Expansion Area Building No 8	Vacant		624.16

Alabama Potato Service, Inc., tenant of building number 3 and a party to these actions, has paid no rent for any month since November 1961. Judgment will be entered in favor of plaintiffs in Civil Action No. 9815

against such defendant with a provision for the eviction of such tenant upon default in the satisfaction of such judgment.

Prudence requires that jurisdiction of these actions be retained by the court for the following purposes: (1) to entertain and dispose of by appropriate order any petition by Southern or the United States for the eviction of any tenant who is a shipper or receiver of freight and who fails to make timely payments of rentals at the prescribed level; (2) to reconsider the reasonable level of rents or the sale price of terminal premises as justice may require in the light of radical changes in the economic situation; (3) to determine, if necessary, the status of new tenants locating at the Birmingham Food Terminal with respect to the shipment or receipt of freight.

It is accordingly Ordered, Adjudged and Decreed by the court as follows:

(1) That these actions be and they are hereby dismissed as they pertain to the following parties, Southern Bonded Warehouse Company, W. L. Smith Poultry Company, Smith's Pride, Inc., and George Espy Produce Company.

(2) That Southern Railway Company and Georgia Industrial Realty Company have and recover of Alabama Potato Service, Inc., the sum of $2,562.00, for which, unless presently paid, execution may issue, and Alabama Potato Service, Inc., its agents, servants, attorneys and privies, and each of them are hereby permanently enjoined and restrained from occupying premises at the Birmingham Food Terminal on and after July 1, 1962, in the event such judgment is not paid in full on or before such date.

(3) That the parties hereto who appear as tenants at the Birmingham Food Terminal in the following schedule, their agents, servants, attorneys and privies, and each

of them, are hereby permanently enjoined and restrained from occupying premises at the Birmingham Food Terminal at monthly rentals less than those provided in such schedule or from purchasing premises thereat at prices less than those shown in such schedule, and further, from occupying such premises as tenants without the payment of such monthly rentals in advance.

Building No.	Tenant	Minimum Sales Price	Minimum Monthly Rental
1	Doc's Transfer & Whse. Co. Piggly-Wiggly (sub-tenant)	$ 150,153.56	$ 1,239.32
2	Jefferson Company & W. C. Hudlow, Jr.	1,581,858.46	12,458.88
3	Alabama Potato Service	68,200.13	564.29
6	S. T. Jerrell Company	107,636.18	890.45
7	Alabama Paper	161,549.81	1,335.61
8	Jefferson Company & W. C. Hudlow, Jr.	1,153,767.81	8,941.67
9	Birmingham Frozen Foods	149,276.30	1,239.40
11	Bruno's Food Stores	97,992.70	808.50
12	Bryan Bros. Packing Co.	439,065.15	3,650.57
13	Early American Foods, Inc.	45,621.18	376.87
14	Home Provision Company	79,550.15	660.14
15	Associated Grocers of Ala.	697,946.98	5,778.88
16	Simonetti, Inc. and Simonetti Realty Co., Inc.	181,448.64	1,497.40
17	Flint Refrigeration Co. and A. & L. Realty Co., Inc.	128,927.84	1,066.17
18	Eidson Produce Co. and Eidson Realty Co., Inc.	193,347.35	1,599.18
19	Alex Kontos Fruit Co. & A. K. Investment Co.	59,647.66	494.17
20-A	Magic City Produce Co.	195,019.12	1,612.23

(4) That defendants, Southern Railway Company and Georgia Industrial Realty Company, their agents, servants, attorneys and privies, and each of them, are hereby permanently enjoined and restrained from directly or indirectly renting to tenants who are shippers or receivers of freight and from selling to persons who are shippers or receivers of freight premises at the Birmingham Food Terminal for rents or sales prices less than those established for each building at such terminal as follows:

Building No	Minimum Sales Price	Minimum Monthly Rental
1	$ 150,153.56	$ 1,239.32
2	1,581,858.46	12,458.88
3	68,200.13	564.29
4	92,211.33	760.64
5	333,536.62	2,771.36
6	107,636.48	890.45
7	161,549.81	1,335.01
8	1,153,767.81	8,941.67
9	149,276.30	1,239.46
10	60,887.50	502.51
11	97,992.70	808.50
12	439,065.15	3,650.57
13	45,021.45	376.87
14	79,550.15	660.14
15	697,946.98	5,778.88
16	181,448.04	1,497.40
17	128,927.84	1,066.17
18	193,347.35	1,599.18
19	59,647.66	494.17
20-A	195,019.12	1,612.23
20-B	154,043.30	1,274.28

In the event any such tenant becomes delinquent in the payment of such rent for more than thirty days, Southern Railway Company is ordered, directed and commanded to file a petition herein containing a prayer for the eviction of such tenant.

(5) That defendants Southern Railway Company and Georgia Industrial Realty Company, their agents, servants, attorneys and privies, and each of them, are hereby permanently enjoined and restrained from directly or indirectly advancing or pledging credit to any person, firm, or corporation for the purchase by or in behalf of any shipper or receiver of freight of any premises at the Birmingham Food Terminal.

(6) That Southern Railway Company and Georgia Industrial Realty Company have and recover of Jefferson Warehouse Company, a corporation, and W. C. Hudlow, Jr., the sum of $29,758.41, and that unless Jefferson Ware-

house Company, a corporation, and W. C. Hudlow, Jr., shall pay said judgment, with interest at 6 percent from the date of this decree, on or before October 1, 1962, process of eviction will be issued by this court.

(7) That jurisdiction of these actions be and the same is hereby retained for the purposes hereinabove enumerated, for the purpose of giving full effect to this judgment, and for the purpose of making such further and other orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out and enforce its judgment.

Done, this the 8th day of June, 1962.

Seybourn H. Lynne,
Judge.

APPENDIX D.

ORDER.

These actions, coming on further to be heard, were submitted upon the respective motions of Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., to amend the memorandum opinion and decree filed herein on June 8, 1962, and the motion filed in behalf of Southern Railway Company and Georgia Industrial Realty Company, as amended, to alter and amend such opinion and decree.

Upon consideration of the motion filed in behalf of Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., the oral arguments of counsel and the record in these consolidated actions, it is Ordered, Adjudged and Decreed by the court that such motion, filed in Civil Action No. 9155, be and the same is hereby overruled and denied.

Upon consideration of the motion filed in behalf of Southern Railway Company and Georgia Industrial Realty Company, the oral arguments of counsel, and the record in these consolidated actions, it is Ordered, Adjudged and Decreed by the court that paragraphs numbered 2, 3, and 9 of such motion be and the same are hereby granted and that such motion as it relates to the remaining numbered paragraphs be and the same is overruled and denied. A separate order will be entered amending such memorandum opinion and decree as indicated.

Done, this the 31st day of July, 1962.

Seybourn H. Lynne,
Judge.

APPENDIX E.

AMENDMENT TO MEMORANDUM OPINION AND DECREE DATED JUNE 8, 1962.

On motion of Southern Railway Company and Georgia Industrial Realty Company, and for good cause shown, it is Ordered, Adjudged and Decreed by the court that the memorandum opinion and decree of this court entered in the above-styled consolidated actions on the 8th day of June, 1962, be and the same are hereby amended in the following particulars:

1. On page 6, in the fifth line of the second full paragraph after the word "rented" there are interpolated the following words, "to a shipper or receiver of freight by rail."

2. On page 7, the minimum rental figure for building No. 17 is corrected to $1,066.19.

3. On page 13, paragraph (2) of the decretal order is amended to substitute the sum of $3,875.93 for the sum of $2,562.00.

Done, this the 31st day of July, 1962.

Seybourn H. Lynne,
Judge.

APPENDIX F.

STATUTES RELIED ON.

Section 2 of the Interstate Commerce Act [49 U. S. C., § 2]:

> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property . . . subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation . . . of a like kind of traffic . . . under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Section 3 (1) of the Interstate Commerce Act [49 U. S. C., § 3 (1)]:

> It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular persons, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Section 6 (7) of the Interstate Commerce Act [49 U. S. C., § 6 (7)]:

. . . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time, nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 8 of the Interstate Commerce Act [49 U. S. C., § 8]:

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9 of the Interstate Commerce Act [49 U. S. C., § 9]:

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter . . . may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions

of this chapter, in any district court of the United States of competent jurisdiction; . . .

Section 1 of the Elkins Act [49 U. S. C., § 41 (1)]:

> . . . it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. . . .

Section 1 of the Elkins Act continued [49 U. S. C., § 41 (2)]:

> In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. . . .

Section 1 of the Elkin Act, continued [49 U. S. C., § 41 (3)]:

> Any person, corporation, or company who shall . . . knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the

regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid: and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

Sec. 2 of the Elkins Act [49 U. S. C., § 43]:

That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commisison or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and

subject to the same provisions as are or shall be authorized by law with respect to carriers.

Sec. 3 of the Elkins Act [49 U. S. C., § 43]:

That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; . . . whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 8 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 425

BIRMINGHAM ICE AND COLD STORAGE COMPANY AND SHAW WAREHOUSE COMPANY, *Appellants*

v.

SOUTHERN RAILWAY COMPANY, ET AL., *Appellees*

MOTION TO DISMISS OR AFFIRM OF APPELLEES JEFFERSON WAREHOUSE AND COLD STORAGE COMPANY AND W. C. HUDLOW, JR.

JAMES W. WRAPE
GLENN M. ELLIOTT
2111 Sterick Building
Memphis 3, Tennessee
Counsel for above-named Appellees

Of Counsel:

WRAPE AND HERNLY
2111 Sterick Building
Memphis 3, Tennessee
and
711 Fourteenth Street, N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Motion to Dismiss	2
Motion to Affirm	5
Summary and Conclusion	11
Appendix "A"	12

INDEX OF CITATIONS

Alexander Sprunt & Son, Inc. v. United States, 281 U.S. 249, 255, 50 S. Ct. 315	4
Boston Tow Boat Company v. United States, et al., 321 U.S. 632, 64 S. Ct. 776	4
Fishgold v. Sullivan Drydocks & Repair Corp., 328 U.S. 275, 291, 66 S. Ct. 1105, 1114	4
Shaw Warehouse Company v. Southern Railway Company, 288 F. 2nd 759 (C.A. 5, 1961), rehearing denied 294 F. 2nd 850 (C.A. 5, 1961)	3, 4, 10
Shaw Warehouse Company v. Southern Railway Company, 308 I.C.C. 609	4, 5, 7, 8, 10
Southern Railway Company v. United States, 186 F. Supp. 29 (N.D. Ala. 1960)	4, 10
28 U.S.C. sec. 2323	3, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 425

BIRMINGHAM ICE AND COLD STORAGE COMPANY AND SHAW WAREHOUSE COMPANY, *Appellants*

v.

SOUTHERN RAILWAY COMPANY, ET AL., *Appellees*

MOTION TO DISMISS OR AFFIRM OF APPELLEES JEFFERSON WAREHOUSE AND COLD STORAGE COMPANY AND W. C. HUDLOW, JR.

Come the appellees Jefferson and Cold Storage Company and W. C. Hudlow, Jr., and, pursuant to Rule 16 of the Revised Rules of the Court, respectfully move the Court to dismiss the appeal in this cause or to affirm the judgment below, and for grounds respectfully show to the Court:

In limine these appellees would direct the attention of the Court to the fact that they assume alternative positions. Insofar as this appeal is concerned, these appellees take the position that the appeal should be

dismissed or that the judgment below should be affirmed, but, insofar as the judgment below is concerned, the position of these appellees is that same should be affirmed *only as respects the appellants herein.* Appellees herein, Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., are much aggrieved at the action of the court below in the cause styled *United States of America* v. *Southern Railway Company, et al.,* as reflected by the memorandum opinion and decree reproduced as Appendix "C" to appellants' jurisdictional statement. These appellees have, in fact, duly filed in the United States District Court for the Northern District of Alabama, Southern Division, in Cause No. 9155, notice of appeal from such memorandum opinion and decree entered June 8, 1962, and the final order thereon entered July 31, 1962, which order is reproduced as Appendix "D" to appellants' jurisdictional statement. Such notice of appeal and designation of record was filed and served on September 27, 1962, and was certified to this Court by the Clerk of the United States District Court for the Northern District of Alabama on September 27, 1962. It is the position of these appellees that, in this cause, the action of the court below is binding upon appellants herein, but that same is invalid as to these appellees in the action, *supra*, wherein the United States of America is plaintiff.

MOTION TO DISMISS

It is respectfully presented that the appeal is not within the jurisdiction of this Court, and appellants have no standing before the Court. Contra to the allegations made in appellants' jurisdictional statement, this is not an action to revoke, set aside or enforce an order of the Interstate Commerce Commission.

With respect to this action, as stated by the court below, pp. 24-25 of appellants' jurisdictional statement:

> "It is a proceeding under Section 3 of the Elkins Act (49 U.S.C.A. sec. 43) and Section 20(9) of the Interstate Commerce Act (49 U.S.C.A. sec. 20(9)) to enforce such Acts. The court and the parties are bound by the report and order in *Shaw Warehouse Company* v. *Southern Railway Company*, supra." [*Shaw Warehouse Company* v. *Southern Railway Company*, 288 F. 2nd 759 (C.A. 5, 1961)].

Appellants were permitted to intervene in the cause below, as is reflected by their motion for leave to intervene and their complaint in intervention, under Section 2323 of the Judicial Code (28 U.S.C. sec. 2323). Such section is reproduced hereto as Appendix "A". It is to be noted that such section is a part of Chapter 157 of the Judicial Code, which is entitled "Interstate Commerce Commission Orders; Enforcement and Review".

The proceeding below was *not* an action to enforce or review an order of the Interstate Commerce Commission. The United States of America has not served notice of appeal from the orders of the court below, and the time for so doing has expired.

The appellants, as intervenors below, have no such interest in the cause as to invest them with an independent right to appeal, and, we respectfully submit, no statute is cited by appellants granting them such right.

Appellants neither seek nor can they receive direct benefit by way of their attack upon the orders of the

court below; by their appeal they simply seek to have this Court rule that appellees should be held responsible for the payment of obligations of two bankrupt corporations. Appellants are not creditors of such corporations. Or that appellees should have been required to pay rental on premises not occupied by them. Appellants have no interest in such premises. Or, that appellees should have been required to pay rental prior to September 1, 1960, upon a basis not established by the Interstate Commerce Commission to be a proper basis until September 1, 1960, in *Shaw Warehouse Company* v. *Southern Railway Company, et al.*, 308 I.C.C. 609, *Southern Railway Company* v. *United States*, 186 F. Supp. 29 (N.D. Ala. 1960). Appellants have no interest in the premises or rental payments, and the basis upon which rental was paid by appellees was in effect, approved in *Shaw Warehouse Company* v. *Southern Railway Company*, 288 F. 2nd 759 (C.A. 5, 1961), rehearing denied 294 F. 2nd 850 (C.A. 5, 1961).

The position of appellants is strictly that of the "dog in the manger". They seek to have a treble-penalty imposed against appellees under the Ellsins Act, when appellants have no standing thereunder, and the payment of rental by appellees which United States of America, plaintiff below, neither seeks nor requires.

It is submitted, therefore, that the court is without jurisdiction to entertain the appeal. See *Boston Tow Boat Company* v. *United States, et al.*, 321 U.S. 632, 64 S. Ct. 776, and cases there cited; *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U.S. 249, 255, 50 S. Ct. 315; *Fishgold* v. *Sullivan Drydocks & Repair Corp.*, 328 U.S. 275, 291, 66 S. Ct. 1105, 1114.

MOTION TO AFFIRM

Appellees Jefferson Warehouse and Cold Storage Company and W. C. Hadlow, Jr., respectfully submit that the judgment below should be affirmed because it is manifest that the questions on which decision of the appeal depends are so unsubstantial as not to need further argument.

The record does not support the statement of the case, nor the circumstances of the case, presented by appellants in their jurisdictional statement:

In 1955 a contract was entered into between an Alabama corporation known as Birmingham Food Terminal, and Georgia Industrial Realty Company, a wholly owned subsidiary of Southern Railway Company, as a result of which a food terminal and warehousing facility was to be constructed in Birmingham, to be known as Birmingham Food Terminal. Stockholders in Birmingham Food Terminal were to be tenants of the proposed facility.

Upon the filing of complaint with the Interstate Commerce Commission by Shaw Warehouse Company, et al., in the cause styled *Shaw Warehouse Company v. Southern Railway Company*, 308 I.C.C. 609, the proposed financing for the Birmingham Food Terminal was withdrawn, and a so-called "Round Robin Agreement" was entered into between Georgia Industrial Realty Company and prospective tenants of Birmingham Food Terminal. This agreement provided for the purchase of facilities occupied by the prospective tenants, and the payment of interim rentals therefor. Two of the signatories thereto were Birmingham Terminal Cold Storage Company and Thomas N. Nelson Company.

These two companies occupied buildings designated as buildings numbers 2 and 8 in Appendix "C" to appellants' jurisdictional statement, pages 23 and 28.

As appears at page 25 of appellants' jurisdictional statement, the court below found:

> "As of July 1, 1958, Nelson Company owed back rents, later found inadequate by the Commission, in the amount of $176,410.04, and Terminal Cold Storage owed $61,239.88. Neither was able to pay its arrearage and neither was able to continue its operation".

The practical aspects of the situation were, therefore, that in two large warehouses the Nelson Company and Birmingham Terminal Cold Storage Company had millions of pounds of merchandise in cold storage, against which warehouse receipts had been issued, and, as stated by the court below, "neither was able to continue its operation." Southern Railway Company was perforce confronted with the necessity of going into the warehousing business or working out some arrangement with an experienced warehouseman to take over the operation of buildings Nos. 2 and 8 in the Birmingham Food Terminal.

Southern Railway Company had had satisfactory experience with Mr. W. C. Hudlow, Jr., in the operation of Chattanooga Warehouse and Cold Storage Company in Chattanooga.

In July, 1958, Mr. W. C. Hudlow, Jr., did agree to conduct warehousing operations at buildings Nos. 2 and 8 through a corporation to be formed, and which was formed, known as Jefferson Warehouse and Cold Storage Company.

The assets of Birmingham Ice and Cold Storage Company and of Thomas N. Nelson Company were liquidated, and every single penny received from the liquidation thereof was paid to the creditors of such companies; some of the experienced personnel of Chattanooga Warehouse and Cold Storage Company devoted some time to converting the operations at buildings Nos. 2 and 8 at the Birmingham Food Terminal facility to an efficient operation, and they were paid by Jefferson Warehouse and Cold Storage Company for all time spent by them in so doing; some equipment of Chattanooga Warehouse and Cold Storage Company, such as pallets and fork-lift trucks were temporarily utilized at Birmingham and full payment for such utilization was made by Jefferson Warehouse and Cold Storage Company.

Warehouse receipts of Jefferson Warehouse and Cold Storage Company were issued in lieu of outstanding warehouse receipts of Thomas N. Nelson Company and Birmingham Ice and Cold Storage Company, with the result that no customer of either of the warehouses suffered any financial loss.

As of approximately August 1, 1958, Jefferson Warehouse and Cold Storage Company entered into an arrangement with Southern Railway Company and its subsidiary, Georgia Industrial Realty Company, under and by virtue of which it proposed to pay, and did pay, rental upon a monthly basis for space actually occupied by Jefferson Warehouse and Cold Storage Company.

As of September 1, 1960, the report and order of the Interstate Commerce Commission in *Shaw Warehouse Company* v. *Southern Railway Company, et al.*, 308

I.C.C. 609, became effective. The date of the report and order was October 6, 1959, but the effective date of the rental base established thereby was September 1, 1960. By such report and order, the rental payable by Jefferson Warehouse and Cold Storage Company for buildings Nos. 2 and 8 was substantially increased.

Included in the rental base upon which rentals were to be calculated were rentals for expansion areas neither occupied nor occupiable by Jefferson Warehouse and Cold Storage Company, office space available for use by the general public and neither occupied nor occupiable by Jefferson Warehouse and Cold Storage Company, the cost of making repairs for latent defects in the cold storage systems, early construction costs which were incurred by Birmingham Terminal Cold Storage Company and Thomas N. Nelson Company, with no benefit whatsoever to Jefferson Warehouse and Cold Storage Company, and the costs of engineering plans and specification which were never utilized, and which were of no benefit to Jefferson Warehouse and Cold Storage Company.

Irrespective of the foregoing factors, which were incorporated in the rental base by the court below, Jefferson Warehouse and Cold Storage Company was the only tenant of any warehouse in the Birmingham Food Terminal facility which attempted to pay, and did pay, rental upon the basis of space actually occupied by it from and after September 1, 1960, under the formula prescribed by the Commission, and from the time that Jefferson Warehouse and Cold Storage Company occupied space in the Birmingham Food Terminal facility until the date of the trial of the cause below it paid rental in the amount $711,084.62.

All equities contra notwithstanding, by the order of the court below all other tenants were excused from the payment of back-rental under the formula enunciated by the Interstate Commerce Commission until from and after May 2, 1962, but Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., were operated with the payment thereof from and after September 1, 1960. Obviously, equity has not been done.

The cause in which appellants appeal, being Civil Action No. 9155 in the United States District Court for the Northern District of Alabama, Southern Division, was initiated by the filing of complaint on July 18, 1958, by the United States of America. Defendants named in the complaint were Southern Railway Company and tenants who had signed the "Round Robin Agreement"; neither Jefferson Warehouse and Cold Storage Company nor W. C. Hudlow, Jr., were named as parties defendant.

Subsequently, on May 5, 1961, upon the representation that the action involved interpretation or enforcement of an order of the Interstate Commerce Commission under 28 U.S.C. sec. 2323, the appellants herein filed their complaint in intervention, joining Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., as parties defendant, and attempting to join Chattanooga Warehouse and Cold Storage Company as a party defendant. Neither of these corporations nor Mr. Hudlow had been joined by the United States of America as a party defendant in the original action filed.

On October 19, 1961, as appears from appendix "A" to the jurisdictional statement of appellants, the court

dismissed the complaint in intervention insofar as it related to Chattanooga Warehouse and Cold Storage Company, and made this further observation, as appears at page 13 of appellants' jurisdictional statement:

> "The disposition which the court is about to make of such motions is not to be construed as an indication that an opinion is presently entertained that the intervening plaintiffs may be entitled to any relief which is not included in or ancillary to the prayers for relief in the original complaint as amended."

It is obvious from the pleadings, of course, that the intervening plaintiffs sought relief which had not been sought by the United States of America in its original complaint or the amendment thereto.

In due course, the United States of America had filed an amended complaint in which it named Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., as parties defendant, but still no recovery was sought of these defendants in line with the prayers of the complaint in intervention filed on behalf of Birmingham Ice and Cold Storage Company and Shaw Warehouse Company.

Both before and subsequent to the time that appellees occupied any portion of the warehouses at Birmingham Food Terminal, various proceedings were in process before the Interstate Commerce Commission and before the courts, to which appellees were not parties. See, for example, *Shaw Warehouse Company* v. *Southern Railway Company, et al.*, 308 I.C.C. 609; *Southern Railway Company* v. *United States*, 186 F. Supp. 29 (N.D. Ala. 1960), *Shaw Warehouse Company* v. *Southern Railway Company*, 288 F. 2nd 759 (C.A.

5, 1961), rehearing denied, 294 F. 2nd 850 (C.A. 5, 1961).

SUMMARY AND CONCLUSION

It is respectfully submitted by appellees Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr., that their motion to dismiss should be sustained on the ground that the appeal of appellants is not within the jurisdiction of this Court and that their motion to affirm the judgment sought to be reviewed should be sustained on the ground that it is manifest that questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Appellants simply seek to have this Court impose penalties and order the collection of rentals in which appellants have no interest in law or in fact, and which relief is neither prayed nor sought by the United States of America, the original plaintiff in the cause.

Respectfully submitted,

JAMES W. WRAPE
GLENN M. ELLIOTT
Counsel for Appellees, Jefferson Warehouse and Cold Storage Company and W. C. Hudlow, Jr.

Of Counsel:

WRAPE AND HERNLY
2111 Sterick Building
Memphis 3, Tennessee
and
711 Fourteenth Street, N. W.
Washington 5, D. C.

APPENDIX "A"

Sec. 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein. As amended May 24, 1949, c. 139, Sec. 116, 63 Stat. 105.

LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
OCT 10 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 425.

BIRMINGHAM ICE AND COLD STORAGE COMPANY
and SHAW WAREHOUSE COMPANY,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY et al.,
Appellees.

MOTION

Of Appellees, Southern Railway Company and Georgia Industrial Realty Company, to Dismiss or, in the Alternative, to Affirm.

JOS. F. JOHNSTON,
GEO. F. MAYNARD,
902 First National Building,
Birmingham 3, Alabama,
Counsel for Appellees, Southern Railway Company and Georgia Industrial Realty Company.

Of Counsel:
CABANISS & JOHNSTON,
W. D. McLEAN,
ARNOLD B. McKINNON.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 425

BIRMINGHAM ICE AND COLD STORAGE COMPANY and SHAW WAREHOUSE COMPANY,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY et al.,
Appellees.

MOTION

Of Appellees, Southern Railway Company and Georgia Industrial Realty Company, to Dismiss or, in the Alternative, to Affirm.

Southern Railway Company and Georgia Industrial Realty Company, appellees in the above-styled cause, pursuant to Rule 16 of the Revised Rules of this Court, move that the appeal attempted to be taken herein by Birmingham Ice and Cold Storage Company and Shaw Warehouse Company, intervenors, be dismissed on the ground that the appeal is not within the jurisdiction of this Court; and in the alternative, these appellees move that the judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ARGUMENT.

I

Argument in Support of Motion to Dismiss Appeal.

This appeal should be dismissed because, although the appellants state that jurisdiction of the appeal is believed to be conferred by 49 U. S. C., § 45 (the Expediting Act), that statute does not authorize a direct appeal to this Court in an action seeking solely to recover money or a penalty. *United States v. New York, N. H. & H. R. R.*, 276 F. 2d 525, 543 (2nd Cir. 1960); see *United States v. Interstate Commerce Comm'n*, 337 U. S. 426, 441-443 (1949).

That this case involves only an attempt to recover money or a penalty is clearly revealed by the "questions presented" stated in the appellants' brief. Although the amended complaint of the United States and the complaint in intervention (which was never amended to conform with the amended complaint of the United States) both sought relief other than the recovery of money, the appellants do not here complain that such other relief was not granted, and indeed, the United States has not even joined in the appeal. The fact of the matter is that all of the other relief sought by the United States and the intervenors was granted. It is true that certain injunctive relief was sought (and all granted), but it was merely ancillary to the efforts of both the United States and the intervenors to compel the collection of back rent. Compare *United States v. St. Regis Paper Co.*, 285 F. 2d 607, 610 (2nd Cir., 1960), *affirmed*, 365 U. S. 857 (1961).

The burden of the intervenors' complaint here is that the District Court did not require their competitor, appellee Jefferson Warehouse and Cold Storage Company, and its principal stockholder, appellee W. C. Hudlow, Jr., to pay as much back rent as the intervenors think the competitor should have been required to pay. In addition, the intervenors seek to extract from their com-

petitor a treble forfeiture under the Elkins Act (49 U. S. C., § 41 (3)), although the United States did not seek such relief. It is apparent on the face of the appellants' jurisdictional statement that this appeal involves merely an action to recover money or, in the alternative, a penalty and that this appeal is not proper under the Expediting Act. That statute was designed "to ensure speedy disposition of suits in equity brought by the United States", *United States v. California Co-operative Canneries*, 279 U. S. 553, 558 (1929), and to interpret the words of the act "in every civil action" to include actions for the payment of money "would indeed be absurd literalism." *United States v. New York, N. H. & H. R. R.*, *supra*; 276 F. 2d at 543.

II.

Argument in Support of Alternative Motion to Affirm the Judgment of the District Court.

Although these appellees earnestly contend that this appeal should be dismissed, even if the judgment of the District Court were appealable directly to the Supreme Court under the Expediting Act, the judgment should be affirmed, since it is manifest that the questions presented, as set out in the jurisdictional statement of the appellants, are so lacking in substance as not to require further argument or consideration by this Court.

The first three "questions presented" involve the decision of the trial court as to how much back rent, under a very complicated set of facts, should be required to be paid by Jefferson Warehouse and Cold Storage Company and its principal stockholder, although the appellants attempt to frame them as questions of law. On the basis of a voluminous record of exhibits and oral testimony and without the intervention of a jury, the District Court determined that a very substantial amount of back rent should be paid and granted other relief designed to eliminate any concessionary practices. District Judge Lynne,

who tried the case, also sat in several prior cases (referred to in the jurisdictional statement) involving the same general controversy between the same parties and is familiar with all background facts and issues. The appellants have suggested no reason whatsoever why this Court should reconsider a factual record already thoroughly canvassed by a trial court so conversant with this involved and complex matter. It is significant that the United States has not appealed from the decision of the trial court and has not even joined in this appeal. We respectfully submit that this Court should decline to review the decision of the lower court on the facts.

The fourth question presented involves the appellants' complaint that the trial court did not permit them to bring in as a third party defendant Chattanooga Warehouse and Cold Storage Company and did not permit discovery with reference to that Company.

Even if the appellants had a right to intervene, which we deny, Rule 14 of the Federal Rules of Civil Procedure permits third party practice only by "plaintiffs" and "defendants" and does not include intervenors (see *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U. S. 53, 58-59 (1935)), and in any event, it is clear from the terms of Rule 14 that even a plaintiff may cause a third party to be brought in only "[w]hen a counterclaim is asserted against" the plaintiff. No claim of any sort has ever been asserted against the intervenor-plaintiffs in this action.

Finally, the decision whether to allow a party to implead an additional party rests in the sound discretion of the trial court, *General Taxicab Ass'n v. O'Shea*, 109 F. 2d 671 (D. C. Cir. 1940), and in the absence of any claim that the trial court abused that discretion, the decision of the trial court should not be reviewed.

As to the appellants' complaint that their discovery was limited, the scope of discovery, including the scope of written interrogatories, is within the sound discretion of

the trial court and will not be disturbed by the court on appeal in the absence of clear abuse of discretion by the trial court. *Newell v. Phillips Petroleum Co.*, 144 F. 2d 338 (10th Cir. 1944); *United States v. Kohler Co.*, 9 F. R. D. 289 (E. D. Pa. 1949); see *Bell v. Swift & Co.*, 283 F. 2d 407 (5th Cir. 1960). Since the appellants do not claim that the District Court abused its discretion in limiting discovery, this Court should decline to review its action.

CONCLUSION.

These appellees move that the appeal be dismissed because of lack of jurisdiction and, in the alternative, move that the judgment below be affirmed on the ground that it presents no question sufficiently substantial to warrant review by this Court.

Respectfully submitted,

JOS. F. JOHNSTON,
902 First National Building,
Birmingham 3, Alabama.

GEO. F. MAYNARD,
902 First National Building,
Birmingham 3, Alabama,
Counsel for Appellees, Southern Railway Company and Georgia Industrial Realty Company.

Of Counsel:

CABANISS & JOHNSTON,
902 First National Building,
Birmingham 3, Alabama.

W. D. McLEAN,
ARNOLD B. McKINNON,
Southern Railway System,
P. O. Box 1808,
Washington 13, D. C.

Certificate of Service.

I, Joseph F. Johnston, one of the attorneys for Southern Railway Company and Georgia Industrial Realty Company, appellees herein, and a member of the Bar of this Court, hereby certify that on this ..... day of October, 1962, I have served copies of the foregoing Motion to Dismiss or Affirm on each of the parties to this appeal, and on the United States, the original plaintiff below, by mailing a copy thereof in a duly addressed envelope, first-class mail, postage prepaid, to their attorneys of record as follows:

1. Mr. David J. Vann,
White, Bradley, Arant, All & Rose,
2100 Comer Building,
Birmingham 3, Alabama,
Attorney for the Intervenor, Birmingham Ice and Cold Storage Company;

2. Mr. A. Alvis Layne,
Layne, Bridgeman and Gottesman,
Pennsylvania Building,
Washington 4, D. C.;
Attorney for the Intervenor, Shaw Warehouse Company (by Air Mail);

3. Mr. Glenn Elliott,
Attorney at Law,
Sterick Building,
Memphis, Tennessee,
Attorney for the Appellees, W. C. Hudlow, Jr., Jefferson Warehouse and Cold Storage Company and Birmingham Terminal Cold Storage Company;

4. Hon. Macon L. Weaver,
United States Attorney,
Federal Building,
Birmingham, Alabama;

5. Hon. Archibald Cox,
Solicitor General of the United States,
Justice Department,
Washington 25, D. C.; and

6. Mr. Daniel M. O'Donoghue,
Attorney,
Bureau of Inquiry and Compliance,
Interstate Commerce Commission,
Washington 25, D. C.,
Attorneys for the Original Plaintiff, the United States of America (by Air Mail to Messrs. Cox and O'Donoghue).

.....
Attorney for Appellees, Southern Railway Company and Georgia Industrial Realty Company.

LIBRARY
SUPREME COURT, U. S.

FILED
DEC 11 1964
JOHN F. DAVIS, CLERK

No. 425

In the Supreme Court of the United States

October Term, 1964

BIRMINGHAM ICE & COLD STORAGE CO. AND SEARS WAREHOUSE CO., APPELLANTS

v.

SOUTHERN RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 425

BIRMINGHAM ICE & COLD STORAGE CO. AND SHAW WAREHOUSE CO., APPELLANTS

v.

SOUTHERN RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

MEMORANDUM FOR THE UNITED STATES

This suit was instituted by the United States on July 18, 1958, at the instance of the Interstate Commerce Commission, to protect the Commission's jurisdiction in a related proceeding then pending before it. The government's complaint sought an injunction against the Southern Railway and the tenants of a commodity terminal owned and operated by the railroad, to restrain them from violating the Elkins Act [1] and the Interstate Commerce Act [2] by the renting of facilities at the terminal for less than fair market

[1] 32 Stat. 847, as amended, 49 U.S.C. 41–43.
[2] 24 Stat. 386, as amended, 49 U.S.C. 20(9).

rentals, by the sale of such facilities at less than fair market value or by the extension of credit or any other advantage by the railroad to the tenants.[3] On October 6, 1959, the Commission issued its decision in the administrative proceeding. *Shaw Warehouse Co.* v. *Southern Railway Co.*, 308 I.C.C. 609, affirmed, 186 F. Supp. 29 (N.D. Ala. 1960). It found that the railroad had violated the Interstate Commerce Act by failing to include certain necessary elements in computing its rental charges; it ordered the railroad to cease and desist from such unlawful rental practices and to file an affidavit of compliance by a date eventually extended to September 1, 1960. On that date, the railroad filed such an affidavit, setting forth an increased rental schedule in purported compliance with the Commission's order.

On May 5, 1961, appellants herein, Birmingham Ice & Cold Storage Co. and Shaw Warehouse Co., intervened in the government's suit as parties plaintiff, seeking various forms of relief in addition to that requested by the government, including treble penalties in favor of the United States.[4] On September 1, 1961, the government amended its complaint, *inter alia*, to request an order compelling the tenants to pay the difference between the rentals they had actually been paying and those set forth in the railroad's affi-

[3] Temporary relief was rendered unnecessary by the parties' agreement that no conveyance of facilities would be made without 30 days' notice to the Commission.

[4] The Attorney General is authorized to seek such penalties under Section 1(3) of the Elkins Act, 32 Stat. 847, as amended, 49 U.S.C. 41(3).

davit of compliance from and after August 1, 1957,[5] or at least from and after September 1, 1960; treble penalties were not requested. On June 8, 1962, the court issued its memorandum opinion and decree, in which, on the basis of the Commission's order, it fixed the minimum monthly rental and minimum sales price for each of the facilities in the terminal; it enjoined the railroad and the tenants from paying or receiving less than the fixed sales prices or rentals; and it enjoined the railroad from advancing or pledging credit for the purchase of the facilities. The court ordered certain of the tenants to pay the fixed rentals from and after September 1, 1960; as to the others, such rentals were required to be paid from and after May 1, 1962. No treble penalties were awarded.

By the terms of the court's order, the United States prevailed in the main areas in which it sought relief. The judgment is adverse to the government only insofar as it requires certain tenants to pay the fixed rentals prospectively only (*i.e.*, from and after May 1, 1962) and denies the government's request that they be payable from August 1, 1957, or at least September 1, 1960. The court gave careful consideration to the government's contentions and recognized their merit; however, in the exercise of its discretion, it found that the equities did not require that all of the tenants pay the higher rents retroactively (J.S. App. C, pp. 23–24). The United States has decided not to appeal so much of the decision as is adverse to it for the reason that the granting or withholding of retrospective relief is usually within the discretion of a court of

[5] The date on which the premises were completed.

equity. Review of the court's decision is not considered necessary to the effective enforcement of the Interstate Commerce or Elkins Acts.

With respect to the appeal of the intervening plaintiffs, we believe there is considerable doubt whether private parties have standing to seek forfeiture to the United States of the treble penalties contemplated by the Elkins Act.[6] As to the other points raised by that appeal, the government takes no position.[7]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

OCTOBER 1962.

---

[6] See note 4, *supra*; cf. 28 U.S.C. 2323.

[7] While two of the defendants in the proceeding below (Jefferson Warehouse & Cold Storage Co. and W. C. Hudlow, Jr.) have filed a notice of appeal in this Court, no jurisdictional statement has yet been filed, and this memorandum relates solely to the intervenors' appeal.

U. S. GOVERNMENT PRINTING OFFICE: 1962